Supreme Court, U.S.
FILED
JAN 9 1981
MICHAEL RODAK, JR., CLERK

No. 80-875

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1980

STATE OF LOUISIANA, et al.,
Petitioners,

VS.

GARY W., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a federal court has authority to enforce against a recalcitrant state agency a valid judgment requiring the payment of court costs and of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976.

PARTIES TO PROCEEDING

The Petition contains a number of errors in its listing of the parties, both in the caption and in the introductory section. (Pet., p. ii). Most significantly, neither the State of Louisiana, its Governor, nor its Health, Social, and Rehabilitation Services Administration (renamed the Louisiana Department of Health and Human Resources) are parties to this case. (*See* p. 2, n.3, *infra.*) The only party-defendant with an interest in the present controversy (and the only defendant who was a party in the court of appeals) is George Fischer, the Secretary of the Louisiana Department of Health and Human Resources, as all of the relief for which review is now being sought was directed against the Secretary in his official capacity.[1] Set forth in the margin is a complete list of the parties to the proceedings on the merits in the district court.[2]

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[1]During the course of this litigation, there have been three Secretaries of the Department of Health and Human Resources: first Dr. William Stewart, then William Cherry, and now, George Fischer.

[2]GARY W., by his mother and next friend, D.S.; JOSEPH G., by his mother and next friend, J.B.; ELIZABETH M., by her mother and next friend, N.C.; on behalf of themselves and all others similarly situated, Plaintiffs,

UNITED STATES OF AMERICA, Plaintiff-Intervenor,

WILLIAM STEWART, as Commissioner of Louisiana Health and Human Resources Administration; SIDNEY GOMEZ, individually, and as Director of Child Placement, Division of Mental Retardation, Louisiana Health and Human Resources Administration; ISRAEL SIDNEY, as Director of Orleans Parish Juvenile Probation Department; THE BROWN SCHOOLS, INC.; JONES CHILDREN'S HAVEN, INC.; DILLEN'S CHILDREN'S HOME, INC.; CHILDREN'S COTTAGE, INC.; EAST TEXAS GUIDANCE AND ACHIEVEMENT CENTER, INC.; MISSION ROAD FOUNDATION FOR EXCEPTIONAL CHILDREN, INC.; MARY LEE FOUNDATION; MARBRIDGE FOUNDATION FOR RETARDED CHILDREN, INC.; SHADY BROOK SCHOOL CORP., INC.; BEAUMONT REMEDIAL CLINIC, INC.; MERIDELL ACHIEVEMENT CENTER, INC.; SUMMIT OAKS ACHIEVEMENT CENTER, INC.; ABILENE YOUTH CENTER, INC.; BAGLEY HOME FOR EXCEPTIONAL CHILDREN, INC.; GREENHIGH RESIDENTIAL TREATMENT CENTER, INC.; HEART OF TEXAS CONVALESCENT HOME, INC.; THE HUGHEN CENTER, INC.; McDONALD DEVELOPMENTAL HOME, INC.; PEACEFUL VALLEY CHILDREN'S HOME, INC.; GERTRUDE THOMAS HOME FOR EXCEPTIONAL CHILDREN, INC.; ROLLING CREEK MANOR, INC.; FRED DAY HOME FOR CHILDREN, INC.; WOOD ACRES CHILDREN'S HOME, INC.; DYER VOCATIONAL TRAINING CENTER; ADA WILSON HOSPITAL OF PHYSICAL MEDICINE AND REHABILITATION, INC.; ANGIE NALL SCHOOL-HOSPITAL FOR EDUCATIONAL RETRAINING, INC.; BARTLEY WOODS HOUSE, INC.; CENTURY EVALUATION AND TRAINING CENTER, INC.; COMMUNITY LIVING CENTER.; DALLAS ACADEMY INC.; DARDEN HILL RANCH SCHOOL, INC.; HOME OF THE HOLY INFANCY, INC.; NEW HORIZONS RANCH, INC.; PARKER FOUNDATION, INC.; RANGER PARK HOSPITAL AND RANGER PARK INN, INC.; SUNSET ACRE HOME; TEXAS CHILDREN'S HOME; CHARLES VAN SCOY, owner, operator of and/or doing business as BALCONES CHILDREN'S PSYCHIATRIC HOSPITAL; SEALY SMITH, owner, operator of and/or doing business as AMERICAN TRAINING CENTER; L. C. BAXTER, owner, operator of and/or doing business as LULLABYE CHILDREN'S HOME, Defendants.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana on the merits of this case is reported at 437 F.Supp. 1209. The opinion of the district court holding that respondents are entitled to attorneys' fees under 42 U.S.C. § 1988 in the amount stipulated to by the parties is reported at 429 F.Supp. 711. The opinion of the district court holding that its judgment requiring the payment of court costs and attorneys' fees is enforceable under either Rule 69 or Rule 70 of the Federal Rules of Civil Procedure is reported at 441 F.Supp. 1121. The opinion of the United States Court of Appeals for the

Fifth Circuit affirming the district court's decision regarding the enforceability of the court costs and attorneys' fees judgment is reported at 622 F.2d 804.

STATEMENT OF THE CASE

This case was filed by respondents on September 3, 1974 as a class action under 42 U.S.C. § 1983. Respondents challenged on federal constitutional and statutory grounds the placement by the Louisiana Department of Health and Human Resources (hereafter "the Department") of hundreds of handicapped and neglected Louisiana children in unfit custodial institutions in Texas, far from the children's homes.[3] Following extensive discovery, a lengthy trial was held before Judge Alvin B. Rubin, in March, 1976. On July 26, 1976, the district court ruled that the Department had

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[3]The caption in this case incorrectly refers to the State of Louisiana as a petitioner. The State is not a party to his case. (To avoid the possibility of confusion, respondents have, in the caption to this brief, followed petitioners' form and listed the State of Louisiana as a petitioner.)

Initially, the suit did name as defendants the State of Louisiana, the Department of Health and Human Resources (which was formerly the Louisiana Health, Social, and Rehabilitation Services Administration and then became the Louisiana Health and Human Resources Administration), and a number of state officials, including the Governor. However, on December 13, 1974, approximately three months after the litigation was commenced, the court granted respondents leave to file a second amended complaint, which, *inter alia*, dropped as defendants the State of Louisiana, the Department, and many of the State officials originally named, including the Governor. It left as the principal state agency defendant the Secretary of the Department in his official capacity. All of the relief for which review is herein being sought was directed against the Secretary of the Department in his official capacity. For this reason, petitioners are hereafter referred to in this brief as "the Department."

violated the children's rights under the Fourteenth Amendment to the United States Constitution and section 408(f) of the Social Security Act, 42 U.S.C. § 608(f)(1). (437 F. Supp. 1209 (E.D. La. 1976)). The court found, *inter alia,* that "in many instances, Louisiana children have been placed in Texas institutions inappropriate to the needs of the particular child involved. In many other instances, children in some Texas institutions have been physically mistreated." (437 F.Supp. at 1220-21).[4] Hearings were subsequently held concerning relief,[5] and on December 2, 1976, the court issued a comprehensive order setting forth relief in the case, requiring, *inter alia,* that individualized treatment plans be developed for the children based on professional evaluations and that the children then be placed in accordance with those plans. An amendment to the December 2, 1976 order was subsequently entered on January 31, 1977. This comprehensive order, as amended, is reported in its entirety at 437 F.Supp. at 1225-1231. It was not appealed by the Department nor by any other defendant.[6]

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[4]Mistreatment in certain of the institutions included serious health and fire hazards, unsafe medical practices, handcuffing, chaining and beating of children, and excessive drugging of children. (Appendix A to Opinion of July 26, 1976).

[5]Interim decrees and orders granting partial relief, some of which required the prompt removal of the children from the institutions referred to in n.4, *supra,* had previously been entered. Orders of June 23, 1976; July 26, 1976; September 10, 1976; and September 22, 1976.

[6]The Petition is doubly incorrect in its assertion that the court "ordered the return of the Louisiana children from Texas to Louisiana at an untold cost to the state. . . ." (Pet., p. 2). First, the court's decision in no way prohibited the respondent from providing adequate treatment in Texas or, for that matter, in any other state. (437 F.Supp. at 1219, 1227). And second, with regard to fund-

Following the court's decision on the merits, respondents applied for the assessment of reasonable attorneys' fees against the Department. The Department contested respondents' entitlement to fees, but stipulated with respondents as to the amount of such fees. (The Statement of Understanding and Joint Stipulation is reprinted at p. A7, *infra.*) On February 3, 1977, following extensive briefing and oral argument, the district court held that respondents were entitled to attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in the amount stipulated to by the parties (429 F.Supp. 711 (E.D. La. 1977)) (Pet., p. A1).

Accordingly, the district court entered a judgment on March 15, 1977, incorporating the previous comprehensive order on the merits, and ordering the Department to pay respondents' court costs and attorneys' fees in the amount stipulated. (The Judgment is reprinted at p. A3, *infra.*)

The Department did not appeal from the judgment, and respondents requested that it be satisfied. After twice attempting and failing to obtain enabling legislation pursuant to Article 12, Section 10(C) of the Louisiana Con-

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ing, the court simply required that, if necessary to implement their treatment plans, the respondent children should receive treatment at the *same* per capita funding level then being expended for them in Texas institutions. (437 F.Supp. at 1227). Indeed, the problem necessitating judicial intervention pertained not to lack of funding, but to the absence of treatment, or, in certain instances, seriously abusive treatment in the Texas institutions. (437 F.Supp. at 1220-21). For, as the court observed, the Department, "in some sort of anti-parochialism," was paying the unmonitored Texas institutions far more than it was paying facilities providing treatment in Louisiana. (437 F.Supp. at 1221).

stitution, the Department refused compliance on the ground that the Louisiana Legislature had voted to defy the judgment.[7]

In order to obtain enforcement of the judgment, respondents, on September 2, 1977, in conformity with Rule 69 of the Federal Rules of Civil Procedure and Louisiana practice, caused a writ of *fieri facias* to be issued directing the United States Marshal for the Eastern District of Louisiana to seize funds of the Department deposited in the American Bank and Trust of Baton Rouge in an amount sufficient to satisfy the judgment. Respondents

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[7]The Petition does not make clear the sequence of the Legislature's rejection of two bills that would have specifically authorized the Department to pay respondents' court costs and attorneys' fees. (Pet., p. A79-A84). House Bill No. 1621, an appropriations bill to satisfy the judgment, was referred to the Committee on Appropriations on May 18, 1977. It was then defeated in Committee and thus failed to reach the House floor. Subsequent to the defeat of this bill, the Legislature ended its regular session. Thereafter, the Legislature was recalled by the Governor for a special session, and legislation authorizing compliance with the judgment in this case was made a part of the legislative call. A new bill appropriating funds specifically to satisfy the judgment, House Bill No. 15, was thereupon introduced, and this time the Committee on Appropriations reported it to the House floor. However, after extensive debate, the bill was defeated in the Louisiana House on August 11, 1977. There is absolutely no record evidence to support petitioners' contention that the bill was defeated because of legislative discontent with the amount that had been stipulated to by the Department. (Pet., p. 3). Indeed, the statement in the Petition that the Legislature unfavorably compared the present award with the award rendered in a wholly unrelated case, *Williams v. McKeithen*, No. 71-98 (M.D. La. 1980) (Pet., p. 3, n.4), cannot possibly be accurate, since the Petition itself indicates that the award in *Williams* was not made until August 14, 1980, some three years after the legislative debate. In any event, the record is clear that the stipulated award in the

thereafter filed both a petition under Rule 69 to make the bank a garnishee, and a motion, in the alternative, for an order of specific performance under Rule 70 of the Federal Rules of Civil Procedure requiring the Secretary, in his official capacity, to pay respondents' court costs and attorneys' fees from departmental funds under pain of contempt, notwithstanding contrary provisions of state law. The Department opposed Respondents' Rule 69 petition and Rule 70 motion, and moved to quash the writ of *fieri facias*.[8]

These matters were heard by the district court on September 21, 1977, and on October 24, 1977, Judge Rubin, then sitting as a district judge by designation, handed down a thorough opinion holding that respondents were entitled to enforcement of the judgment by way of *either* a Rule 69 writ of execution or a Rule 70 specific performance order.

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present case was eminently reasonable. As Judge Rubin pointed out:

> "The case reached trial after two years of intensive preparation. Over 47,000 pages of exhibits were introduced or referred to: over 3,300 pages of testimonial depositions were introduced; and the trial occupied eleven days. The testimony of eighteen expert witnesses and sixteen fact witnessses was taken. Eighteen lawyers participated in the trial. [It should be noted that only three of these lawyers appeared for respondents.] Voluminous briefs have been filed, before and after the trial." 437 F. Supp. at 1213.

In the intervening three years since the Legislature took its stand in defiance of the district court's order, it has failed to enact legislation appropriating funds to satisfy the still outstanding judgment.

[8]The Department also moved for rescission of the judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the court's entitlement decision was based on "mistake, inadvertence, or excusable neglect."

(441 F.Supp. 1121 (E.D. La. 1977))(Pet., p. A8). Since respondents expressed "no preference" as between Rule 69 and Rule 70 modes of enforcement, and the Department "stated that, if relief is to be granted, they would prefer an order issue pursuant to Rule 70" (441 F.Supp. at 1127) (Pet., p. A18), the court issued a Rule 70 enforcement order. The Order, which is reprinted at p. A1, *infra,* directed the Secretary, in his official capacity, to pay respondents' court costs and attorneys' fees from departmental funds under pain of contempt, notwithstanding contrary provisions of the Louisiana Constitution.[9]

On October 28, 1977, the Department filed an appeal from the court's enforcement order and was granted a stay pending appeal on the condition that it place $225,000 in escrow in lieu of a supersedeas bond. (Pet., p. A20).[10] On July 31, 1980, the Fifth Circuit issued a unanimous decision

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[9]The court's order included an award of attorney's fees for the professional work performed by plaintiffs' attorneys to obtain enforcement of the judgment (p. A2, *infra*), the amount of such fees again having previously been stipulated to by the parties. (441 F.Supp. at 1127-28) (Pet., p. A18-A19). The court also issued a separate order on the same date denying the Department's Rule 60(b) motion to rescind the attorneys' fees judgment. (441 F.Supp. at 1123-24) (Pet., p. A9-A11).

[10]Petitioners are incorrect in asserting that the district court "seized" state funds. (Pet., pp. i, 7, 9, 12). The court simply issued an order requiring the Secretary in his official capacity to comply with the terms of the judgment. (*See* p. A1 *infra.*) The Order itself makes clear that the remedy for noncompliance, as in the case of any other injunction, is contempt, not seizure. (*Id.* at A2). The funds were placed by the Department in an escrow account, not pursuant to a seizure, but as a condition of a stay pending appeal, in lieu of a bond. (Pet., p. A20). The Department has had the full use of the interest pending the completion of the appellate process. (Pet., p. A21).

(Judges Goldberg, F. Johnson, and Hatchett) affirming the district court's enforcement order. (622 F.2d 804)(Pet., p. A23). The court made extensive reference in its decision to its unanimous decision a few months earlier in *Gates v. Collier,* 616 F.2d 1268 (May 17, 1980) (Judges Hill, Brown, and Randall) (Pet., p. A29), in which both petitioners and respondents in this case had filed amicus briefs.

ARGUMENT

A. In urging certiorari, petitioners do not claim a conflict in the circuits.[11] Nor do they seriously argue that the

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[11]While petitioners do not urge a circuit conflict, they nonetheless seem to suggest that *New York State Association for Retarded Children v. Carey,* 631 F.2d 162 (2d Cir. 1980) (Pet., p. A62), and *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1975), are somehow pertinent to this Court's decision on certiorari. (Pet., pp. 10-11). Their failure to assert a conflict is understandable, however, for there is nothing in the decisions of the Second and Ninth Circuits in those cases that in any way conflicts with the Fifth Circuit's decision here.

Carey involved an attempt to cite a governor for contempt for allegedly violating the terms of a consent decree by failing to obtain legislative funding for a Review Panel to oversee claimed unconstitutional conditions at a state institution. But in denying contempt, both the majority and concurring opinions pointed out that the governor had fully complied with the Decree, since, in terms, it only required him "to act within his 'lawful authority, including the State Constitution and applicable State laws and subject to any legislative approval that may be required.'" 631 F.2d at 166. While the majority opinion in *Carey* did state that, in fashioning relief, a court should attempt to utilize alternatives that do not require the "enforce[ment of] a direct order . . . to raise and allocate large sums of money" (631 F.2d at 165) (ellipsis in original), it did so in a context in which such alternatives were available ("order[ing] the state either to take the steps necessary to rectify the violations or to close the institution," *id.*). As both the district court and the court of appeals found in the present

judgment below contravenes any decisions of this Court.[12] Rather, their argument for review is based on the contention that the case involves an important and unsettled question of federal law. However, while the question of

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case, however, in a circumstance such as this where money (in the form of attorneys' fees and court costs) is the nub of the dispute, the only way to enforce a valid judgment against a recalcitrant state agency is by a Rule 70 order requiring specific performance or a Rule 69 writ of execution. (441 F.Supp. at 1127) (Pet., p. A18); (622 F.2d at 806-07) (Pet., pp. A25, A27); *see also Gates v. Collier*, 616 F.2d 1268, 1270-72 (5th Cir. 1980) (Pet., pp. A31-A34). That the court in *Carey* did not hold that a state official could never be subject to contempt for failing to comply with a judgment requiring the payment of money was made clear in the Order on Petition for Rehearing, which left open the possibility of contempt upon remand. 631 F.2d at 169. (This Order was inexplicably omitted from the reprint of the decision in the Petition.)

Hamilton v. MacDonald, supra, is entirely inapposite. The case did not involve the enforcement of a money judgment but, rather, of an order requiring the transfer of land. 503 F.2d at 1148. Consequently, the only question decided was whether the provision of Rule 69 applying state procedure to a writ of execution (unless the case is governed by an applicable federal statute) applied to an order of specific performance under Rule 70, and the court held that it did not. *Id.* While the court did discuss in general terms the applicability of Rule 69 to money judgments, it did not focus, presumably because the issue was not before it, on that part of Rule 69 which allows for the enforcement of such judgments by a means other than a writ of execution. *See* pp. 15-16, *infra.*

[12]Petitioners' reliance on *South Dakota v. North Carolina*, 192 U.S. 286 (1904), for the proposition that "sometimes judgments simply are not enforceable" is entirely misplaced. (Pet., p. 12). The judgment against the state in that case *was* enforced by this Court through the creative use of its equity power to foreclose upon state property. 192 U.S. at 321. Moreover, as the Court remarked 14 years later in *Virginia v. West Virginia*, 276 U.S. 565, 592 (1918), the "doubt [that] had been expressed by individual judges" as to the enforceability of a money judgment against a state was not passed on by the Court in that earlier case since "that question was not involved in the case . . . and that subject was hence left open to be passed on in the future when the occasion required."

whether a federal court has the authority to enforce against a recalcitrant state agency a valid judgment for the payment of money may be important, it has been settled for at least 62 years.

In *Virginia v. West Virginia*, 276 U.S. 565 (1918), this Court made plain that a federal court has full authority to compel a state to pay a valid judgment. As Chief Justice White stated for a unanimous Court:

> "That judicial power essentially involves the right to enforce the results of its exertion is elementary. *Wayman v. Southard*, 10 Wheat. 1, 23; *Bank of the United States v. Halstead*, 10 Wheat. 57; *Gordon v. United States*, 117 U.S. 697, 702." 246 U.S. at 591.

Petitioner urges that the principle set forth in *Virginia v. West Virginia* applies only to controversies between states and is, thus, inapplicable to the present case which involves a dispute between individuals and a state agency. (Pet., p. 8). But the only reason the federal courts might ordinarily be impotent in the latter situation is the Eleventh Amendment, which, in most instances, bars retroactive monetary awards against state agencies. *Edelman v. Jordan*, 415 U.S. 651 (1974). For, as *Virginia v. West Virginia* specifically points out, except in cases coming under the Eleventh Amendment, "[t]he State . . . as a governmental entity [has] been subjected by the Constitution to the judicial power . . . and the duty to enforce the judgment . . . [is] certain, even although th[is] exertion may operate upon the governmental powers of the State. . . ." 246 U.S. at 600. It is precisely this "[judicial] power which, following its recognition in *Chisholm v. Georgia*, 2 Dall. 419, was

withdrawn [in part] by the adoption of the Eleventh Amendment." *Id.* Thus, for a case not within the reach of the Eleventh Amendment, *Virginia v. West Virginia* is controlling upon the federal court's power to enforce its judgment against a state agency.

The judgment whose enforceability is at issue in the present case concerns court costs and an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Court costs, of course, have been recognized as outside the scope of the Eleventh Amendment at least since *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), if not much earlier. *See* collected cases in *North Dakota v. Minnesota*, 263 U.S. 583 (1924). And in *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978), this Court made plain that attorneys' fees under the 1976 Act were likewise beyond the Eleventh Amendment's reach. Thus, under the doctrine of *Virginia v. West Virginia*, the district court had both the "power . . . and the duty to enforce the judgment by resort to appropriate remedies" (246 U.S. at 600) against petitioners who, while conceding the judgment's validity, were otherwise unwilling to comply with it. (441 F.Supp. at 1127) (Pet., p. A18).[13]

B. While *Hutto v. Finney*, 437 U.S. 678 (1978), did not directly address the enforcement question, the decision is premised on the enforceability of a judgment awarding court costs and attorney's fees against a state agency.

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[13] *See also Griffin v. Prince Edward County*, 377 U.S. 218, 233 (1964), in which this Court held that, if necessary to enforce federal rights, the federal courts have the power to order the levy of a tax and the expenditure of revenues.

First, if petitioners are correct that a state agency has the raw power to escape liability for a valid federal court monetary judgment, there would have been little point to the Court's vigorous debate over the reach of the Eleventh Amendment in *Hutto* or, for that matter, in the numerous cases on the subject since *Hans v. Louisiana,* 134 U.S. 1 (1890). *See, e.g., Edelman v. Jordan,* 415 U.S. 651 (1974); *Employees of Department of Public Health & Welfare v. Missouri,* 411 U.S. 279 (1973); *Parden v. Terminal Railway,* 377 U.S. 184 (1964). For under the petitioners' interpretation, the Eleventh Amendment would, for all practical purposes, be entirely superfluous; if states could avoid federal court intervention in their fiscal affairs simply by refusing to pay any judgment ordered, it would matter little whether they are subject to the court's jurisdiction.

Second, in *Hutto,* the Court was not confronted simply with the propriety of a fee award in the abstract but, rather, with an outstanding district court "order requiring that the fees be paid from public funds." 437 U.S. at 690. *See also Finney v. Hutto,* 548 F.2d 740, 742 (8th Cir. 1977) ("order requiring the [fee] award to be paid directly from the funds of a state agency"). And the Court made it clear that relief of this sort was precisely what Congress intended in enacting the 1976 Act:

> "[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). S. Rep. No. 94-1011, p. 5 (1976)."

437 U.S. at 694; *see also* H.R. Rep. No. 94-1558, p. 7 (1976).[14]

Third, in a portion of the *Hutto* opinion joined by the Chief Justice and Justice Powell, the Court emphasized the importance of sanctions requiring the payment of money to the control of litigation by the federal courts, including cases involving state agencies, and stated in language reminiscent of that used in *Virginia v. West Virginia, supra:*

> "[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. . . . If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." 437 U.S. at 690-91; *see also id.* at 695, n.24.

The ramifications of the Department's position that a judgment involving the payment of money, even when issued under the court's equity powers, cannot be enforced by a specific performance order under pain of contempt, but only by a writ of execution, and that a state can, at its option, exempt itself from such a writ entirely, would render the type of sanctions discussed in *Hutto,* as well as such relief as back pay awards under a variety of federal stat-

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[14]The Court also pointed out that the Congress twice rejected attempts to amend the Act in a fashion that would accomplish precisely the result petitioners seek here. 437 U.S. at 694, *see* 122 Cong. Rec. S16431-S16434 (Sept. 2, 1976) (amendment of Sen. Helms); 122 Cong. Rec. S16567 (Sept. 24, 1976) and S16656-57 (Sept. 27, 1976) (amendment of Sen. Allen).

utes (*e.g.*, 42 U.S.C. § 2000e, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)), entirely unenforceable.

C. As the opinions of both the district court and the court of appeals in this case (and in *Gates v. Collier, supra*, 616 F.2d at 1271 (Pet., pp. A32-A33), its Fifth Circuit predecessor) make clear, the Federal Rules of Civil Procedure provide the district court with the tools necessary to secure compliance with its judgment. (Pet., pp. A11-A18, A26-A27). Since respondents had no preference between the two possible modes of relief—a Rule 69 writ of execution and a Rule 70 specific performance order—and since petitioners "stated that, if relief is to be granted, they would prefer an order issue pursuant to Rule 70" (441 F.Supp. at 1127) (Pet., p. A-18), the district court enforced the judgment by way of an order requiring specific performance (*infra* at p. A1). A brief review of both rules leaves no doubt that the district court acted fully within its authority.

Rule 70. Petitioners' sole argument against the district court's order requiring specific performance is that a Rule 69 writ of execution is the exclusive means of enforcing a money judgment in federal court. (Pet., pp. 11-12). Petitioners state: "if Rule 69 were not to apply to the execution of *all* money judgments, there would have been an exception clearly provided within the terms of Rule 69." (Pet., p. 11) (emphasis in original). The obvious flaw in petitioners' argument, however, is that Rule 69 in terms *does* contain such an exception. Rule 69(a) states: "the process to enforce a judgment for the payment of money

shall be a writ of execution, *unless the court directs otherwise*" (emphasis added). Thus, the use by the district court of its equity power to enforce, against a state official in his official capacity, a judgment requiring the payment of court costs and attorneys' fees from agency funds was fully consistent with Rule 69. Indeed, since the origin of court costs and attorneys' fees is the "original authority of the chancellor to do equity" (*Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939)),[15] a Rule 70 order requiring specific performance is perhaps the most appropriate way to enforce such relief, particularly where, as here, the repository of the funds is a state agency, against which a writ of execution might be unnecessarily disruptive.

Rule 69. As the district court recognized, the judgment requiring the Department to pay respondents' court costs and attorneys' fees was also enforceable by a Rule 69 writ of execution. (441 F.Supp. at 1125-27) (Pet., pp. A14-A18). Rule 69(a) provides that the "procedure" in obtaining a writ shall be in accordance with state "practice and procedure," "except that any statute of the United States governs to the extent that it is applicable." Assuming, as petitioners contend, that the total exemption under Article XII, Section 10(C) of the Louisiana Constitution of *all* state property from attachment *is* a "practice" or "pro-

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[15]As early as 1882, this Court held that the federal courts can order the payment of attorneys' fees, "irrespective of any state legislation." *Dodge v. Tulleys,* 144 U.S. 451, 457 (1892). "[T]heir general powers as courts of equity are not determined and cannot be cut off by any state legislation." *Id.*

cedure,"[16] an applicable federal statute, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which makes attorneys' fees to the prevailing party "part of the costs," "governs" this case for purposes of Rule 69. For, as *Hutto v. Finney, supra,* 437 U.S. at 694, 700, made clear, Congress specifically intended fee awards under the Act to be collected directly from state agency funds.

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[16]This assumption is, in fact, extremely dubious. There is no case law supporting the view that the *total* exemption by the state of a particular party from any writ of execution is a rule of "practice" or "procedure" to be followed under Rule 69. In *Anderson v. Tucker,* 68 F.R.D. 461, 462 (D. Conn. 1975), the court pointed out that, in interpreting Rule 69, state rules "are to be applied in a common sense manner, of course." While many courts have held that state law governs as to the applicable exemptions, in all of these cases the exemption has been only of certain types of property of a party, not of all the property that a party might own, which is, of course, tantamount to an exemption of the party itself. *See, e.g., U.S. v. Miller,* 229 F.2d 839 (3d Cir. 1956); *First National Bank of Boston v. Santisteban,* 181 F.Supp. 366 (D.P.R. 1960), *aff'd,* 285 F.2d 855 (1st Cir. 1961); *U.S. v. Hackett,* 123 F.Supp. 106 (W.D. Mo. 1954). It would turn principles of federalism totally around if the states could declare certain individuals, or certain classes of individuals, completely beyond the reach of the enforcement power of the federal courts in every case in which a money judgment against them were rendered. For example, if a state legislature were to perceive some advantage to the state in exempting all policemen, or all teachers, or all persons in a certain location, from enforcement of money judgments against them by a writ of execution, we would not think the federal courts bound by that decision by virtue of Rule 69 in cases involving the violation of federal law. For, as this case exemplifies, at the point where an exemption becomes that of a party rather than that of certain property of a party, it becomes a matter of substance rather than a mere matter of practice or procedure; that is, it comes to govern not the manner in which the prevailing party shall have a remedy, but whether the party shall have a remedy at all.

D. As in *Virginia v. West Virginia, supra,* 246 U.S. at 604-06, where the Court gave the state a final opportunity to comply voluntarily with the judgment before bringing federal enforcement machinery to bear, the district court in the present case also first attempted to obtain voluntary compliance. The court recounted in its decision regarding respondents' enforcement motions (which were filed only after the Legislature had voted to defy the judgment):

> "State defendants were given the opportunity, even after these motions were heard, to suggest a manner in which they could satisfy the judgment. But they have not offered any kind of compliance with the judgment, direct or indirect, soon or after an interval. This court would not be fulfilling its duty if it failed to enforce the constitutional statutes of the Congress." (441 F.Supp. at 1127) (Pet., p. A18).

As the court of appeals stated upon reviewing the record below: "an order directing the responsible state official to satisfy the judgment out of state funds is the only reasonable way to ensure compliance with a valid federal judgment." (622 F.2d at 807) (Pet., p. A27).[17]

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[17]The only alternative method of enforcing the judgment ever offered by petitioners was presented to the court of appeals at oral argument:

> "At oral argument, appellants suggested that appellees might seek a contempt citation against the Louisiana legislature for failing to appropriate funds to satisfy the judgment. However, the Louisiana legislature is not a party to this action. Moreover, the chaos in the state appropriations process appellants predict if the court's order is affirmed would be dwarfed by the disruption that would be caused by a contempt citation against the state legislature, if such a sanction is possible." (622 F.2d at 806, n.4) (Pet., p. A25).

E. Petitioners urge that "this is a case of first impression" (Pet., pp. 8, 14). Insofar as the case involves the enforcement of a valid money judgment against a state agency that is outside the scope of the Eleventh Amendment, it is controlled by *Virginia v. West Virginia, supra.* (*See* pp. 10-11, *supra*). And while the Civil Rights Attorney's Fees Awards Act of 1976 may be relatively new, orders by the federal courts requiring state agencies to pay attorney's fees, under other federal statutes or for bad faith, as well as court costs, have been issued throughout the history of the Republic. The absence of any case law on the subject indicates that such judgments have routinely been satisfied. This circumstance would seem to eliminate any serious doubt as to their enforceability. As Chief Justice White stated in *Virginia v. West Virginia*:

> "Nor is there room for contending to the contrary because, in all the cases cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. This must be unless it can be said that, because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute." 246 U.S. at 591-92.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

December, 1980.

Respectfully submitted,

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(Appendix Follows)

Appendix

United States District Court
Eastern District of Louisiana

Civil Action
No. 74-2412
Section "C"

Gary, W., et al

v.

William Cherry, et al

ORDER PURSUANT TO RULE 70 REQUIRING DEFENDANT CHERRY TO PAY PLAINTIFFS' ATTORNEYS' FEES FROM DEPARTMENTAL FUNDS NOTWITHSTANDING ARTICLE XII, SECTION 10(C) OF THE LOUISIANA CONSTITUTION

Good cause having been shown, it is hereby ORDERED, ADJUDGED and DECREED:

1. Defendant William Cherry in his official capacity as Secretary of the Louisiana Department of Health and Human Resources (hereafter DHHR) shall, within 10 days of this Order, notwithstanding Article XII, Section 10(C) of the Louisiana Constitution and all statutes enacted and regulations promulgated pursuant thereto, pay plaintiffs' attorneys from funds of DHHR the amount of attorneys' fees and costs specified from date of Judgment;

2. Defendant William Cherry in his official capacity as Secretary of DHHR shall, within 10 days of this Order, notwithstanding Article XII, Section 10(C) of the Louisiana Constitution and all statutes enacted and regulations promulgated pursuant thereto, pay plaintiffs' attorneys from funds of DHHR attorneys' fees and costs as follows:

a. To the Children's Defense Fund of the Washington Research Project $2,000.00 in attorneys' fees and $322.00 in expenses incurred through September 21, 1977, together with interest at the legal rate from the date of this Order;

b. To William Rittenberg $1,000.00 in attorneys' fees incurred through September 21, 1977, together with interest at the legal rate from the date of this Order.

3. For purposes of compliance with this Order, the application to defendant Cherry of Article XII, Section 10(C) of the Louisiana Constitution, and all statutes enacted and regulations promulgated pursuant thereto, shall hereby be enjoined;

4. Defendant Cherry shall thereafter be held in contempt of this Court if he fails to comply fully with the requirements of paragraphs 1 and 2 of this Order.

New Orleans, Louisiana, this 24th day of October 1977.

/s/ ALVIN B. RUBIN

United States District Judge

United States District Court
for the
Eastern District of Louisiana

Civil Action
No. 74-2412
Section "C"

Gary W., et al.,
Plaintiffs,

v.

William Stewart, et al.,
Defendants.

JUDGMENT AGAINST ALL DEFENDANTS EXCEPT DYER VOCATIONAL TRAINING CENTER AND EAST TEXAS GUIDANCE AND ACHIEVEMENT CENTER

This case having been tried on the claims of plaintiffs and plaintiff-intervenor against all defendants for injunctive relief, and the court having rendered its decision on those claims, and there being no claims remaining outstanding against any defendants except for plaintiffs' claims for damages against defendants Dyer Vocational Training Center and East Texas Guidance and Achievement Center, and there being no just reason for delay of the entry of a final Judgment against all defendants except Dyer Vocational Training Center and East Texas Guidance and Achievement Center;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be Judgment entered in favor of plaintiffs and the members of their class and plaintiff-intervenor against defendants William Stewart and Sidney Gomez, their successors in office, agents, employees and assigns (hereafter "Department of Health and Human Resources"); Abilene Youth Center, Inc.; Ada Wilson Hospital of Physical, Medicine and Rehabilitation, Inc.; American Training Center (Sealey Smith owner and operator); Angie Nall School—Hospital for Educational Retraining, Inc.; Balcones Children's Psychiatric Hospital (Charles Van Scoy owner and operator); Bartley Woods House, Inc.; Beaumont Remedial Clinic, Inc.; Century Evaluation and Training Center, Inc.; Darden Hill Ranch School, Inc.; Dillens Children's Home, Inc.; Gertrude Thomas Home for Exceptional Children, Inc.; Home of the Holy Infancy, Inc.; Hughen Center, Inc.; McDonald Development Home, Inc.; Mary Lee Foundation; Marbridge Foundation for Retarded Children, Inc.; Meridell Achievement Center, Inc.; Mission Road Foundation for Exceptional Children, Inc.; New Horizons Ranch, Inc.; Parker Foundation; Ranger Park Hospital and Inn; Shady Brook School, Inc.; and Summit Oaks Achievement Center, Inc. as follows:

1. The Department of Health and Human Resources is permanently enjoined from sending any children to Balcones Children's Psychiatric Hospital, Dyer Vocational Training Center, Inc., and Gertrude Thomas Home for Exceptional Children, Inc. All members of the plaintiffs' class now residing in these institutions shall be removed pursuant to the court's Order of September 22, 1976;

2. As set forth in the court's Order of September 10, 1976, Gertrude Thomas Home shall immediately feed all Louisiana children in a position which has the head and trunk elevated to at least a 45° angle with the head aligned in the midline position, i.e., not allowed to drop back or to either side, to prevent aspiration. A physical therapy consultant must be called in by Gertrude Thomas Home to teach and initially aid direct care staff in achieving the proper safe feeding position;

3. The Department of Health and Human Resources; Abilene Youth Center, Inc.; Ada Wilson Hospital of Physical, Medicine and Rehabilitation, Inc.; American Training Center (Sealey Smith owner and operator); Angie Nall School-Hospital for Educational Retraining, Inc.; Balcones Children's Psychiatric Hospital (Charles Van Scoy owner and operator); Bartley Woods House, Inc.; Beaumont Remedial Clinic, Inc.; Century Evaluation and Training Center, Inc.; Darden Hill Ranch School, Inc.; Dillens Children's Home, Inc.; Gertrude Thomas Home for Exceptional Children, Inc.; Home of the Holy Infancy, Inc.; Hughen Center, Inc.; McDonald Development Home, Inc.; Mary Lee Foundation; Marbridge Foundation for Retarded Children, Inc.; Meridell Achievement Center, Inc.; Mission Road Foundation for Exceptional Children, Inc.; New Horizons Ranch, Inc.; Parker Foundation; Ranger Park Hospital and Inn; Shady Brook School, Inc.; and Summit Oaks Achievement Center, Inc. shall implement fully and with dispatch each and every provision of the court's Order of December 2, 1976 ("Order With Respect To Children In Texas Institutions"), as amended in the court's Minute Entry of January 24, 1977;

4. The Department of Health and Human Resources shall pay the Children's Defense Fund of the Washington Research Project $174,519.88 for attorneys' fees and litigation expenses incurred through December 22, 1976, together with interest at the legal rate from date of Judgment.

5. The Department of Health and Human Resources shall pay William Rittenberg $30,397 for attorneys' fees incurred through December 22, 1976, together with interest at the legal rate from date of Judgment.

6. The Department of Health and Human Resources shall pay the court costs of plaintiffs and plaintiff-intervenor, as taxed by the clerk of the court.

7. The court shall retain jurisdiction of this cause.

/s/ ALVIN B. RUBIN

United States District Judge

New Orleans, Louisiana
March 15, 1977

United States District Court
for the
Eastern District of Louisiana

Civil Action
No. 74-2412
Section "C"

Gary W., et al.,
Plaintiffs,

v.

William Stewart, et al.,
Defendants.

STATEMENT OF UNDERSTANDING AND JOINT STIPULATION

It is the mutual understanding between counsel for plaintiffs and counsel for state-defendants, William Stewart and Sidney Gomez, that plaintiffs are seeking to be awarded attorneys' fees in this case pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94-559) and, alternatively, under the "bad faith doctrine".

With respect to the "bad faith doctrine", plaintiffs are not seeking attorneys' fees against defendants Stewart and Gomez in their individual capacities and, thus, are not claiming that these defendants have individually acted in bad faith. Plaintiffs' claim under the "bad faith doctrine" is that DHHR (formerly LHHRA) has acted in bad faith. This claim is based on the facts in evidence set forth in

Plaintiffs' Memorandum Regarding the Court's Proposed Order and Attorneys' Fees (August 11, 1976), pp. 10-20, and Plaintiffs' Reply Memorandum In Response to Defendants' Memoranda Concerning Attorneys' Fees and the Court's Proposed Order (September 15, 1976). State defendants claim that the facts in evidence set forth in State Defendants' Memorandum In Opposition to Awarding Attorneys' Fees and Court Costs, pp. 18-22, refute the allegations of the bad faith of the agency.

Following a complete review and analysis of the documentation submitted to counsel for state defendants by counsel for plaintiffs, plaintiffs and state defendants jointly agree and stipulate that, should the court determine that plaintiffs are entitled to an award of attorneys' fees, then, considering all of the circumstances, the following hours, rates, expenses, and total compensation are agreed and stipulated to as reasonable:

For CDF attorneys:

Stephen P. Berzon, Attorney, 1,666 hours at $60 per hour equals $99,960.00

Daniel Yohalem, Attorney, 1,100 hours at $40 per hour equals $44,000

Janet Shur, Attorney, 500 hours at $30 per hour equals $15,000

Out of Pocket Litigation Expenses equal $15,559.88

For William Rittenberg:

CY-1974, 153.3 hours at $40 per hour equals $6,132.00

CY-1975, 208 hours at $45 per hour equals $9,360.00

CY-1975, 298.1 hours at $50 per hour equals $14,905.00

TOTAL 659.4 hours; $30,397.00

Agreed and Stipulated to:

By: /s/
STEPHEN P. BERZON
Attorney for Plaintiffs
This 22nd Day of
December 1976

By: /s/
CARMACK M.
BLACKMON
Attorney For State
Defendants This 27th Day
of December 1976

By: /s/
WILLIAM E.
RITTENBERG
Attorney for Plaintiffs
This 27th Day of
December 1976